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IN THE

Supreme Court of the United States

October Term, 1971

70-284

No. ~~1829~~

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

MICHAEL LOUIS SILVERMAN.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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MICHAEL LOUIS SILVERMAN.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, the Commonwealth of Pennsylvania, by its attorneys Robert Duggan, District Attorney; Carol Mary Los, Assistant District Attorney; Robert L. Campbell, Assistant District Attorney; J. Kent Culley, Assistant District Attorney, respectfully prays that a writ of Certiorari Issue, and pursuant to Rule 23 of this Honorable Court, your petitioner respectfully represents as follows:

Opinions Below

Michael Louis Silverman was indicted on a bill charging Possession of Narcotic Drugs at No. 18 October Session 1968, in the Criminal Court of Allegheny County,

Pennsylvania. On February 20, 1969, at the conclusion of a non-jury trial before the Honorable Samuel Strauss, Silverman who was represented by private counsel, was found guilty and on February 21, 1969, was formally sentenced to a term of imprisonment of not less than two years or more than five years. The lower court's Memorandum Opinion filed June 10, 1970 pursuant to Rule 46 of the Pennsylvania Superior Court is attached to this petition (26, 27). No post-trial motions were filed by Silverman nor was an appeal taken.

On May 26, 1969, Silverman filed a petition pursuant to the Post-Conviction Hearing Act, alleging that:

1. He was coerced into entering a guilty plea;

2. He was not afforded his right to appeal by his attorney;

3. He was led to believe that if he entered a guilty plea, he would be sent to Lexington Kentucky for treatment.

On October 3, 1969, an evidentiary hearing was held before Judge Strauss. Silverman was represented by counsel from the Public Defender's Office of Allegheny County. On October 8, 1969, Judge Strauss entered an order dismissing Silverman's petition with leave for Silverman to file an appeal *Nunc Pro Tunc*. The order is attached to this Petition (28).

On or about December 9, 1969, Silverman filed a Petition for Leave To File Appeal *Nunc Pro Tunc* with the Pennsylvania Superior Court at No. 718 Miscellaneous Docket. The Petition was granted by the Court on December 30, 1969, *Per Curiam*. A copy of the Order is attached to this Petition (29).

On January 8, 1970, Silverman filed his appeal with the Superior Court at No. 140 April Term, 1970. Silverman then requested by Petition a waiver of court appointed counsel. On April 6, 1970, the Superior Court granted the waiver. The judgment of sentence appealed by Silverman to the Superior Court was affirmed *Per Curiam* on June 11, 1970. The opinion of the Superior Court is attached to this Petition (31-39).

The published report of the case in the Pennsylvania Superior Court is as follows:

Commonwealth v. Michael Louis Silverman, 217 Pa. Superior 68, 266 A2d 794 (1970).

A Petition for Allowance of Appeal from the Superior Court to the Supreme Court of Pennsylvania was filed July 2, 1970 by Silverman at No. 3297A Miscellaneous Docket. On August 13, 1970, the Pennsylvania Supreme Court filed an Order granting Silverman's Petition. The order of the Pennsylvania Supreme Court is attached to this Petition (40-41).

Silverman's appeal from the order of the Superior Court at No. 140 April Term, 1970, was filed on August 27, 1970 and docketed in the Pennsylvania Supreme Court at No. 8 March Term, 1971. On March 18, 1971, the Pennsylvania Supreme Court reversed the order of the Superior Court, vacated the judgment of the sentence of February 21, 1970, and reinstated the sentence of February 20, 1970. The opinion of the Supreme Court of Pennsylvania is attached to this Petition (41-48).

The published report of the case in the Pennsylvania Supreme Court is as follows:

Commonwealth v. Michael Louis Silverman, (Pa. Supr. Ct. March 18, 1971) ___ Pa. ___ : ___ A2d ___ (1971).

Statement of Jurisdiction

1. The above referred to judgment of the Supreme Court of Pennsylvania was entered March 18, 1971.

2. The jurisdiction of this Honorable Court is invoked, under 28 USCA, Section 1257 (3).

Question Presented for Review

The trial judge imposed a tentative sentence on the defendant Silverman after finding him guilty as charged. The tentative sentence was imposed on February 20, 1969 at the conclusion of the trial. The trial judge however, was appraised of certain factors regarding Silverman's past record from the Allegheny County Behavior Clinic which caused the judge to modify Silverman's sentence in a court proceeding the following day. The imposition of the initial sentence was for a term of years but was conditioned on the defendant's seeking treatment at a drug clinic. If Silverman would be accepted and agree to the treatment, the initial sentence was to be suspended. The sentencing which modified the first sentencing, did not provide for the same condition but rather reinstated the sentence of imprisonment for a term of years. The Pennsylvania Supreme Court, after the affirmance of the trial court's sentence by the Pennsylvania Superior Court, found that the modification increased the defendant's sentence and therefore, violated the prohibition against double jeopardy under the Fifth Amendment to the United States Constitution. Under the circumstances, the Petitioner raises the question:

1. Whether Pennsylvania law permitting increase as well as decrease of sentence within thirty days or a term of court, violates the Federal Constitutional Prohibition against double jeopardy?

Constitutional Provisions

The Fifth Amendment to the Constitution of the United States in pertinent part provides:

> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;"

The Fourteenth Amendment to the Constitution of the United States in pertinent part provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law;"

Statement of the Case

Michael Louis Silverman was indicted in the Criminal Court of Allegheny County, Pennsylvania, No. 18 October Sessions 1968 on a bill charging possession of narcotic drugs. Silverman, represented by private counsel, entered a plea of not guilty and waived trial by jury. On February 19, 1969, a trial was commenced before the Honorable Samuel Strauss. Silverman was found guilty of the charge of possession of narcotic drugs on February 20, 1969. Silverman's contention on appeal to the Superior and Supreme Courts of Pennsylvania, and the sole issue to be determined here, arise from the fact that at the conclusion of the trial in the lower court on February 20, 1969, the court imposed the following sentence:

> "The Court (TT 111-112):[1] In your case, the sentence of the Court is that you pay the cost of prosecution, that is on Indictment No. 18 of October, 1968, pay the cost of prosecution and undergo imprisonment in the Western Correctional, Diagnostic and Classification Center for not less than two or more than two

[1] Numerals in parentheses preceded by the Letters "TT" refer to pages of the Trial Transcript.

[*sic*][2] years. This sentence is to be suspended upon condition that the federal authorities will commit you to Lexington under the program for the rehabilitation of narcotics users, which means that you must be there under an involuntary commitment for a period of seven months and then be paroled for a period of three years; the violation which will return you automatically. Do you understand that question?

Mr. Silverman: Yes, your Honor.

The Court: You can take up your negotiations as soon as the federal authorities notify us they are ready to accept you on those terms, and then our sentence is suspended."

On the following day, February 21, 1969, with Silverman's Counsel present the appellant was again brought before the Court and resentenced pursuant to the following colloquy:

"The Court: All right. Mr. Silverman, I tentatively yesterday indicated what I thought we would do as a disposition in this case, and then as you left the room, I gave some second thoughts to the matter and I wanted to determine what the situation was in your case. I was a bit leery of your professed intention to want to go to Lexington and help yourself, then I learned that you had a number of other charges against you that are current, and this morning I find that there had been a presentence report made by the Behavior Clinic of this county back in 1966. With all this additional information, I am convinced that the sentence that I intended to impose altruistically in the hopes that maybe you could be cured from the narcotic habit was not based on fact, but rather on fiction; so I called you back at this time so that we may dispose of the sentence. We have a gentleman here from the

[2] The statutory sentence is not less than two or more than five years for the crime committed by Silverman and, in both the dissenting opinion in the Superior Court and the majority opinion in the Pennsylvania Supreme Court acknowledge that this was a typographical error on the part of the court reporter. The official sentence as it reads on the indictment is not less than two or more than five years.

probation office. I see the report here indicates that your record of criminal activity goes back some years. How old are you today?

Mr. Silverman: Twenty-one, sir.

The Court: You are 21 now. Well, as a juvenile offender, there are two appearances in the Allegheny County Juvenile Court. You were charged in 1962 with larceny of a car and you were returned home under parental supervision. They were hopeful at that time that you might reform.

The next time you appeared in Juvenile Court was in 1963, and on that occasion, as a result of several burglaries you were sentenced to the Youth Development Center at Cannonsburg.

Mr. Silverman: I was at the Youth Development Center for a car. I was a passenger in a car that was in a wreck, stolen, of course.

The Court: All right. What happened to the burglary charges, then?

Mr. Silverman: I wasn't convicted of the burglary charges in Juvenile Court.

The Court: You were sentenced to the Youth Development Center, that is the important thing.

Mr. Silverman: Yes, sir.

The Court: After you were released from the Youth Development Center on January 7, 1965, you were arrested on January 27, 1956, and charged with aggravated assault and battery, carrying concealed weapons. You were certified to the Criminal Courts of this county at that time. In addition to that, there were a series of offenses for which you were charged in this court in 1966. One charge was receiving stolen goods, second charge, receiving stolen goods, third charge, a fraudulent uttering of a forged instrument, a fourth charge of fraudulently uttering a forged instrument, fifth charge, false pretense, and the sixth charge was false pretense.

What is your name, sir?

Mr. McCullough: John McCullough.

The Court: Mr. McCullough, you are a representative of the probation office of this county?

Mr. McCullough: Yes, sir.

The Court: Are you familiar with the records of this Defendant in your office?

Mr. McCullough: Yes, sir. He had two probations. They are now inactive and there is an active case currently for burglary and receiving stolen goods. He was a convicted violator on his two probations and a parole.

The Court: He has had two probations and a parole already?

Mr. McCullough: Right, and he violated them by being convicted of charges while on these probations and this parole.

The Court: Is there any active probation that he has now violated as a result of this conviction?

Mr. McCullough: No. This conviction does not violate his prison probation.

The Court: The sentence of the Court on the charge of possession of heroin—we might observe, too, that you were most uncooperative with the Court. It is obvious that you were protecting the source of the narcotics. That has meaning to us because it indicates to the Court that you have not decided to abandon the use of narcotics. You are trying to protect those from whom you received them. You tried to protect your co-defendant. The sentence of the Court is that you, Michael Silverman, on this indictment, that you be sentenced to pay a fine of 6¼ cents on indictment No. 18 of October, 1968, in which you are charged on the First Count, possession of narcotic drugs, to-wit, heroin, that you have been sentenced to pay a fine of 6¼ cents, the costs of prosecution, and undergo imprisonment, that you be sent to the Western Correctional Diagnostic and Classification Center to serve not less than two nor more than five years for that charge, and that you stand committed."

The constitutional issue relating to double jeopardy was first raised by Silverman in his brief filed in the Pennsylvania Superior Court at 140 April Term, 1970. It was Silverman's contention in that appeal that final sentence was pronounced upon him, vacated, then increased, all of which constituted a violation of the federal constitutional prohibition against double jeopardy.

The Commonwealth took the position that the trial judge was acting within his statutory rights in modifying the tentative sentence and that the bill of indictment at No. 18 October Term, 1968 clearly indicated that the formal and only sentence of the Court was that of February 21, 1969. The Pennsylvania Superior Court affirmed the lower court, *per curiam*.

The Statute relied upon by the Commonwealth and under which the trial court was acting when it modified the sentence was the Act of June 1, 1959, P. L. 342 § 1, 12 P. S. § 1032 (Supp. 1970). The pertinent provision of this statute provides as follows:

> "In any civil, criminal or equitable proceeding in which the court has heretofore been vested with the power, jurisdiction and authority to alter, modify, suspend, reinstate, terminate, amend or rescind, any order, decree, judgment or sentence only during the term of court in which the order, decree, judgment, or sentence, was entered of record the court in addition to such power, jurisdiction and authority shall hereafter have the same power, jurisdiction and authority to alter, modify, suspend, reinstate, terminate, amend or rescind the order, decree, judgment or sentence for a period of thirty days subsequent to the date of entering of record the order, decree, judgment or sentence in any instance where the term of court shall terminate prior to such thirty day period; Provided, That all parties in interest including the district attorney in criminal cases, are notified in advance of such proposed alteration, modification, suspension, reinstatement, termination, amendment or recission."

On appeal to the Pennsylvania Supreme Court at No. 8 March Term, 1971, Silverman renewed his claim that the sentence of the trial judge of February 20, 1969, was a final sentence and that the subsequent sentence increased the first and therefore violated the Fifth Amendment prohibition against double jeopardy.

The Judgment of Pennsylvania Supreme Court, on March 18, 1971, reversed the Superior Court, vacated the trial court's sentence of February 21, 1969 and reinstated the sentence of February 20, 1969. It is from this judgment that the Petitioner appeals.

ARGUMENT

Reason for Allowance of the Writ

The Court below has decided a federal question of substance not heretofore determined by this Court.

I. Under Pennsylvania case law, sentences have been subject to modification within the term of court in which they were imposed at the absolute discretion of the trial judge. See, *e.g.,* Dyott v. Commonwealth, 5 Wharton 67 (1839); Commonwealth *ex rel.* Berry v. Tees, 177 Pa. Superior Ct. 126 (1958); Commonwealth *ex rel.* Eichelberger v. Maroney, 177 Pa. Superior Ct. 323 (1955); Commonwealth v. Hottle, 139 Pa. Superior Ct. 128 (1940); Commonwealth *ex rel.* Leary v. Day, 178 Pa. Superior Ct. 583 (1956), cert. denied, 350 U. S. 1008; Commonwealth *ex rel.* Lewis v. Tees, 177 Pa. Superior Ct. 132 (1955); Commonwealth *ex rel.* Paylor v. Cavell, 185 Pa. Superior Ct. 176 (1958), cert. denied, 358 U. S. 854; Commonwealth *ex rel.* Young v. Day, 180 Pa. Superior Ct. 276 (1956). Since 1959, the Legislature has decreed that the courts should have the same power to modify sentences during a thirty day period from their imposition even if the term of court expired during that interval. Act of June 1, 1959, P. L. 342, No. 70, § 1, 12 P. S. § 1032. The exercise of that power to increase sentences within thirty days or term of court has since that time been reaffirmed by the appellate courts. See, *e.g.,* Commonwealth v. Gallagher, 200 Pa. Superior Ct. 136 (1962); Commonwealth *ex rel.* Gaynor v.

Maroney, 199 Pa. Superior Ct. 81 (1962); see also, Commonwealth v. Vivian, 426 Pa. 192 (1967). The rule has also been recognized and approved in Federal Court. United States *ex rel.* Jones v. Commonwealth, 218 F. Supp. 689 (W. D. Pa. 1963).

In the Silverman case however, the Honorable Justice Eagen of the Pennsylvania Supreme Court declared that the prior decisions of Pennsylvania law with regard to this sentencing procedure would have to be disregarded because of the recent decisions by the United States Supreme Court in Benton v. Maryland, 395 U. S. 784 (1969), and North Carolina v. Pearce, 395 U. S. 711 (1969).

Benton held that under the double jeopardy rule applicable to the states, a state defendant acquitted of larceny on his first trial but convicted of burglary may not be retried on the larceny count after his burglary conviction had been set aside on appeal. Under the doctrine of *autrefois acquit,* the same result has been historically required under Pennsylvania law prior to Benton, Act of March 31, 1860, P. L. 427, § 30, 19 P. S. § 464; Hollister v. Commonwealth, 60 Pa. 103 (1869).

On the other hand, even under the rule established by Benton, the imposition of increased sentences is not prohibited under all circumstances. On the very day that the United States Supreme Court decided in Benton v. Maryland, *supra,* that the prohibition of double jeopardy applies to the states, the same Court also decided that the double jeopardy clause does not prohibit the imposition of a greater sentence upon reconviction after the granting of a new trial:

> "Long established constitutional doctrine makes clear that . . . The guarantee against double jeopardy imposes no restriction upon the length of a sentence imposed upon reconviction . . . [W]e cannot say that the constitutional guarantee against double jeopardy of its own weight restricts the imposition of an otherwise lawful single punishment for the offenses in question." North Carolina v. Pearce, 395 U. S. 711, 719 (1969).

The Court stressed that "corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial." (395 U. S. at 721, n. 18. It further held (395 U. S. at 723):

> "A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities . . .' Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new pre-sentence investigation, from the defendant's prison record, or possibly from other sources."

If such is the case in a re-sentencing procedure after a completely new trial, how then in the present case can the double jeopardy standard apply to a modification of a tentative sentence based on "new light" gained by the trial judge where he acts the following day, and according to state case and statutory law, even if the modification increases the sentence?

Admittedly, there are decisions which have held that in the federal courts, after a sentence was imposed and executed, the court could not increase it. The reason for this rule, however, was not the double jeopardy prohibition but

the fact that prior to the passage of the Organized Crime Control Act of 1970, 18 U. S. C. Sec. 3576 (and to this day in cases not within that Act), "loss of jurisdiction occurred when the prisoner was committed to the jail, prison or penitentiary, and began service of the sentence . . . " Rowley v. Welch, 114 F. 2d 499, 501, note 3 (D. C. Cir. 1940). See Acme Poultry Corporation v. United States, 146 F. 2d 738, 739 (4th Cir. 1944), cert. denied 324 U. S. 860 (1945).

In the instant situation, the Court had the full "power, jurisdiction, and authority to alter, modify, . . . amend . . . the sentence for a period of 30 days subsequent to the date of entering of record the sentence . . . " Pa. Stat. Ann. § 1032 (Supp. 1969). Unlike the Federal Courts which under the Federal Rules of Criminal Procedure are only given the power to correct illegal sentences and to reduce other sentences, Fed. Rules Crim. Proc., Rule 35 (1961), "it is within the power of the (Pennsylvania) lower court to reconsider the original sentences it has imposed and to either reduce or increase them in penalty or severity so long as" it is within the statutorily allowed period. Commonwealth *ex rel.* Taylor v. Myers, 208 Pa. Superior Ct. 417, 418 (1968); Commonwealth *ex rel.* Gaynor v. Maroney, 199 Pa. Superior Ct. 81, 83 (1962); United States *ex rel.* Jones v. Pennsylvania, 218 F. Supp. 689 (W. D. Pa. 1963). Again, whereas under United States v. Benz, 282 U. S. 304, 406 (1931), a federal court may reduce a sentence within the term but has no power to increase the punishment, in Pennsylvania, an increase within the term of Court and later within thirty days was specifically authorized for historical case and statutory law and did not violate any constitutional standards. Commonwealth *ex rel.* Berry v. Tees, 177 Pa. Superior Ct. 126, 129 (1955).

This limited state power has not been eliminated by Benton and Pearce. These cases merely hold that the federal constitutional prohibition of double jeopardy under the Fifth Amendment is applicable to the states. Neither case held that every interpretation of the application of the double jeopardy prohibition in the federal courts or every statutory interpretation aimed at avoiding possible constitutional questions, should automatically apply to the states.

Where a state has consistently allowed a thirty day or term of court period for sentence modification and where numerous state and federal courts have consistently held that the practice did not violate any constitutional standards, there is no rule of constitutional procedure that requires its automatic elimination.

The United States Supreme Court has long been careful to distinguish those supervisory federal precedents interpreting the constitution which apply only to federal courts from those applying universal standards to both federal and state courts. See McNabb v. United States, 318 U. S. 332, 391 (1943). A standard of reasonableness under the federal constitution should be distinguished from decisions interpreting and mandating constitutional standards for the federal courts under the United States Supreme Court's supervisory powers. See Ker. v. California, 374 U. S. 23, 45-46 (1963) (concurring opinion).

Recent attempts to establish an appellate review for sentencing of defendants indicate that leading publicists, legislators, attorneys and state courts agree that the present limitation as to an increase in sentence in the federal courts is a problem of procedure and supervisory power rather than constitutional law.

Connecticut, Maine, Maryland and Massachusetts have established sentencing panels to review the decisions of the

trial court. If a defendant appeals his sentence, the court may increase as well as decrease his sentence. Each of these statutes and their interpretive case law indicate that there is no constitutional prohibition, *per se*, to a court increasing sentence after imposition, so long as due process requirements are satisfied.

Thus, under Connecticut General Statutes Annotated, Title 51, Sec. 195 (1968), the review division can increase the sentence on review. The Connecticut Supreme Court in Kohlfuss v. Warden, 149 Conn. 692, 695 (1962), cert. denied, 371 U. S. 928 (1963), stressed that their common law double jeopardy limitations, identical to the federal standard, do not preclude an increase of sentence on review. Of course, to satisfy constitutional due process standards, the defendant has a right to counsel and must be given an opportunity to be heard. Consiglio v. Warden, 153 Conn. 673 (1966); United States *ex rel.* Kohlfuss v. Reincke, 254 F. Supp. 440 (D. Conn. 1965).

Similarly, in Massachusetts, an appellate review division is given jurisdiction to increase a sentence. To satisfy due process requirements, the defendant must be given an opportunity to be heard and has a right to counsel. Mass. Ann. Law, C. 278, Sec. 28A-28B (as amended 1968); In re Croteau, 353 Mass. 736 (1968). Answering specifically the double jeopardy argument, the Massachusetts Supreme Court has indicated that so long as due process requirements are satisfied, the legislature has the power to grant the courts the power to review and increase sentences. Hicks v. Commonwealth, 345 Mass. 89, 91 (1962). Maine's Statute and therefore its constitutional justification is virtually identical to that of Massachusetts. See Maine Rev. Stat. Ann., Title 15, Sec. 2141 (1965).

Maryland's statute also allows the appellate division to review and increase a sentence so long as due process requirements are satisfied. Md. Ann. Conn., Art. 26, Sections 132-138 (Supp. 1968). While recognizing that ordinarily a sentence cannot be increased, Brown v. State, 237 Md. 492 (1969), the Maryland Supreme Court acknowledged a limited exception to be allowable when authorized by statute. Moon v. State, 250 Md. 468, 79 (1967). Recently the Maryland Statute was challenged as unconstitutional under Benton and Pearce. The Maryland Court of Special Appeals upheld the statute, noting that it "has not been held unconstitutional and all presumptions favor the constitutionality of a duly enacted statute. The statute will not be declared unconstitutional unless it plainly contravenes the federal or state constitutions." Robinson v. Warden, 258 A. 2d 771, 772 (Md. Ct. Spec. App. 1969). In his concurring opinion, Judge Orth indicated why Benton and Pearce do not prohibit the imposition of the harsher sentence on review.

> "The [Supreme] Court found no absolute bar to the imposition of a more severe sentence on Conviction after reversal and retrial. It did find, however, that the impact of due process made necessary that certain requirements be met to justify a harsher sentence. . . ."
>
> ". . . None of the requisites prescribed by the statute . . . violate due process of law or any other constitutional right or is any constitutional right violated by the rights and powers given the review panel, including such powers given to order an increased sentence. I note that any person . . . has the right to counsel, the right to appear in person . . . [and to receive] a copy of the decision. . . . Since there is no absolute constitutional bar even on the imposition of a more severe sentence . . . on retrial . . . there is, by like reasoning, no absolute constitutional bar to the imposition of a more severe sentence on review of sentence." 258 A. 2d at 773-74

While each of these statutes allow an increase in sentence by a review panel on a defendant's appeal, they support the established doctrine that the federal limitation increase of sentence after conviction is procedural rather than constitutional. Under them, as under the Pennsylvania statute and case law, specific jurisdiction is conferred to the court to increase a sentence under specified conditions; see, for example, Commonwealth v. Vivian, 426 Pa. 192, 201, n. 7. Under them, defendants are entitled to an opportunity to be heard, to representation by counsel, and to a reasoned decision indicating that an increase is justified by newly discovered or not previously considered relevant evidence. Once these due process requirements are satisfied, a limited exception to an absolute prohibition on increase in sentence is proper and necessary. "When the original sentence is too short to achieve the relevant criminal law goals, [the] lack [of] power to increase [a sentence] prevents the satisfactory disposition of individual offenders and inhibits consistent sentencing principles." Comment, Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study, 69 Yale L. J. 1453, 1462 (1960).

Similarly, various proposals have been offered in the United States Congress to modify the accepted procedural limitation as to increase of sentence after imposition. Each of these proposals follow the state standards noted above, in that they would allow a special panel or an appellate court to increase sentence if defendant appeals. To satisfy due process requirements, defendant has a right to counsel, an opportunity to be heard and a right to have the reasons for the increase affirmatively stated on the record. See S. 2722, 89th Cong., 1st Session (October 22, 1965); S. 823, 88th Cong., 1st Session (February 18, 1963); H. R. 270,

85th Cong., 1st Session (January 3, 1957); see also S. Weigel, Appellate Review of Sentences to make the Punishment Fit the Crime, 20 Stanford L. Rev. 405, 419 (1968).

Most recently, Congress has reiterated and the President has signed legislation based on the finding that any limitation as to the power of a court to increase sentence after imposition is at most a procedural one and that the legislature has the constitutional power to allow an increase as it does not to allow it. S. 30, the Organized Crime Control Act of 1970 provides in Title X—Dangerous Special Offender Sentencing (18 U. S. C. Sec. 3576) that:

> "with respect to any sentence imposed on the defendant after proceedings under section 3575 (allowing after proof by a preponderance of evidence, a 'dangerous special offender' to be sentenced for an increased term up to thirty years), a review may be taken by the defendant or the United States on both to a Court of Appeals.
>
> . . . The Court of Appeals may . . . affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, on remand for further sentencing proceedings and imposition of sentence; except that a sentence may be increased or otherwise changed to the disadvantage of the defendant only on review taken by the United States and after hearing."

(Emphasis supplied.) 116 Cong. Rec. S. 328 (Senate—daily edition January 21, 1970); 116 Cong. Rec. H. 9764 (House—daily edition October 7, 1970); 39 U. S. L. W. 33 (Adopted version). Before voting on this proposed statute clearly authorizing the government to appeal and secure an increase of sentence, extensive debate was heard on its constitutionality. In the Senate, Senator McClellan stressed that the provision for appellate review of sentence would implement the recommendations of the President's Crime

Commission for supervision over trial judges who mete out light sentences. The procedure did not violate the double jeopardy prohibition and would "promote the evolution of sentencing principles and enhance respect for our system of justice." 116 Cong. Rec. S. 338 (daily edition January 21, 1970); see 116 Cong. Rec. S. 352 (Senator Byrd). Arguments that the provision would violate the double jeopardy provision, 116 Cong. Rec. S. 426 (daily edition January 22, 1970—A. C. L. U.), were rejected and the Senate passed the Act, including the above quoted Section 73 to 1. 116 Cong. Rec. S. 481 (daily edition January 23, 1970).

In the House, extensive debate was also had on the constitutionality of proposed 18 U. S. C. Sec. 3576. Representative Poff pointed out that the granting to the government of a right to appeal the sentence was carefully framed to meet constitutional requirements. North Carolina v. Pearce, 395 U. S. 711 (1969), indicated that no absolute prohibition exists under the double jeopardy clause to an increase of sentence after imposition, assuming due process requirements are satisfied. 116 Cong. Rec. H9751 (daily edition October 6, 1970); 116 Cong. Rec. H9717 (Rep. Mayne—daily edition October 7, 1970). Representative Dennis proposed an amendment to strike out appeals by the government. In response, other Representatives carefully noted the due process safeguards in the section, its freedom from the vices of vindictiveness of a trial judge and limitation of appellate rights possible in other provisions. While a question of policy may urge different results, in the eyes of the House the constitutional objection was clearly without merit. 116 Cong. Rec. H9765-67 (daily edition October 7, 1970). Rep. Poff introduced a letter by Edward L. Wright, Esquire indicating that the American Bar Association affirmed the constitutionality of the government securing an increase in sentence on its own

appeal. 116 Cong. Rec. H9767 (daily edition October 7, 1970); see 116 Cong. Rec. H9658-59 (daily edition October 6, 1970). The Amendment was defeated 40 to 23 and the Act was adopted 341 to 26. 116 Cong. Rec. H9768, 9779 (daily edition October 7, 1970). The statute, having been proposed by the Administration, having been passed by both Houses, now enacted into law, 39 U. S. L. W. 33, clearly indicates that no constitutional limitations exist to preclude either the federal government or *a fortiori*, the state governments from establishing procedures by which sentences can be reviewed and increased, on motion by the government, either by the trial court through a petition for reconsideration of sentence, as authorized by Pennsylvania law, or by an appellate court by direct appeal, as authorized by federal law.

The American Bar Association Project on Minimum Standards for Criminal Justice extensively debated the question of whether an appellate tribunal should have the power, on defendant's appeal, to increase sentence. The Advisory Committee in its April 1967 draft of the Standards Relating to Appellate Review of Sentences would have prohibited such an increase and noted supposed constitutional objections. Their opinion was opposed by the Special Committee and the final Section 3.4 was adopted by the A. B. A. Bar of Delegates so as to allow an increase on appeal (Approved Draft, April 1968); see R. Hruska, Appellate Review of Sentences, 8 Amer. Crim. L. Q. 10, 13 (1969). The American Law Institute in its Model Panel Code Sec. 708 (1961) also suggested a change in the present procedural limitation as to increase of sentences. In their proposal, after a defendant is given a "tentative sentence" of one year, a special commission may review the background of the defendant and resentence him to whatever term might have been imposed initially. The Comment to

Tentative Draft #2 (1954) indicates that the justification would be to extend the ordinary term of court limitation on resentencing to one year. Obviously then, the drafters saw no constitutional problems to a term of court or thirty-day modification as established under Pennsylvania procedure. See Note, Statutory Structures for Sentencing Felons to Prison, 60 Colo. L. Rev. 1134, 1162 (1964); Comment, 18 Rutgers L. Rev. 188, 190 (1961).

In a symposium on change in the federal rules to allow appellate review of sentencing, various professors and federal judges expressed their belief in the value of allowing appellate judges to increase sentence even on the state's own appeal. The context was to suggest statutory change and objections on any alleged constitutional grounds were minimal. Appellate Review of Sentencing, 32 F. R. D. 249, 261, 273, 279, 292, 298 (1952). In fact, at this symposium, twenty-four of the thirty-eight federal judges—a clear majority—believed that the government could and should be given the statutory right to seek an increase on review. 32 F. R. D. 320-21 (1962).

Since our constitutional protections are derived from those of the English common law, a comparison to the British and Canadian procedure is of interest. In England, until recently, the Court of Criminal Appeals could impose a more severe sentence on appeal. Criminal Appeal Act, Sec. 4, 7 Edw. VII, (2) (1908); see S. Sobeloff, A Recommendation for Appellate Review of Criminal Sentences, 2 Brooklyn L. Rev. 2, 5 (1954). While this has now been changed by statute, D. Thomas, Appellate Review of Sentences and the Development of Sentencing Policy—The English Experience, 20 Alab. L. Rev. 193, 196 (1968), this still indicates that no absolute limitation on increase in sentence after imposition is founded in the common law and

thus could not have been contemplated as within the constitutional prohibition of double jeopardy. Similarly in Canada, whose legal tradition parallels that in the United States, both the prosecution and the defendant can appeal from a sentence and the appellate court can increase or reduce the sentence. Hyde, Canadian Law on the Subject of Appellate Review of Sentences, 32 F. R. D. 305, 306 (1962).

Thus, the recent discussion and consideration of appellate review of sentences would indicate that there is no real constitutional prohibition to such an increase either on appeal to this Court or in a reconsideration of sentence. Since an appellate court can be given the power to increase a sentence, it would be both undesirable and unnecessary to deny a conscientious trial judge all power to alter or amend a sentence after imposition. Just as the legislature or case law could authorize an appellate court to increase a sentence, a legislative authorization of judicial reconsideration of sentence should be not only available but appropriate without constitutional objection. See J. George, Sentencing Methods and Techniques in the United States, 26 Fed. Prob. 33, 35, 36 (June 1962).

Thus, the difference in power to modify sentences between the Federal and Pennsylvania courts is not a matter of double jeopardy law and has no roots in the Federal Constitution. Rather, it reflects a difference between the Federal Statutes and rules which normally make sentences final immediately upon imposition and the Pennsylvania law which holds such sentences to be subject to modification within the term of court or thirty days.

Surely, if as mentioned above, upon a new trial and sentencing, events subsequent to the first trial can be considered, North Carolina v. Pearce, 395 U. S. 711 (1969),

information on the status of a defendant that corrects the admitted misimpression of a trial judge who possesses the requisite jurisdictional power, can be used to correct an inadequate sentence. Courts should not "extend the technical conception of jeopardy from the point at which the amendment is a protection against them to one at which it becomes both an instrument for making the act of judgment a non-deliberative act and a loophole, if not a breach, from the escape of convicted persons from merited punishment." Rowley v. Welch, 114 F. 2d 499, 503-04 (D. C. Cir. Ct. 1940). The Court continued (at 504):

> "The Amendment contemplates the protection of two interests. It looks of course to the protection of the person charged with crime. But it does not require this at the cost of ignoring entirely the interest of the community in protection from criminal activities. The former should not be whittled away by judicial decisions which permit substantial invasions of the rights to be punished only once for a single offense and to be free from substantial jeopardy of second punishment for it. Neither should the latter be whittled down by making of the conception of jeopardy a highly technical idea unrelated to the substance, immediacy and inescapability of the threat of double punishment . . . Requiring a defendant who had been once acquitted of crime, though erroneously, to stand trial for it a second time on reversal of the judgment, not only returns him from the status of one acquitted to that of possible conviction, but subjects him to the expense and other burdens incident to another trial. These consequences do not adhere to the mere correction, promptly made, of a sentence . . ."

In a case like the instant appeal, where detailed reasons can be given for the imposition of a greater sentence after tentative sentencing, "we believe it is quite clear that the demands of Fourteenth Amendment due process do not forbid the imposition of a second sentence harsher than the

one earlier vacated when an adequate reason for the harsher sentence is apparent on the record." United States *ex rel.* Wintz v. Rundle, 281 F. Supp. 85, 89 (E. D. Pa.); see Commonwealth *ex rel.* Billman v. Burke, 74 F. Supp. 846, 848 (E. D. Pa. 1947), aff'd, 170 F. 2d 443 (3d Cir. 1947). Compare North Carolina v. Pearce, 395 U. S. 711 (1969); Commonwealth v. Vivian, 426 Pa. 192, 201, n. 7 (1967).

Conclusion

Under Pennsylvania law, prior to the instant case, it was absolutely clear that all final judgments, including sentences in criminal cases, were subject to modification within the term of court, or since 1959, within thirty days of entry. It has been equally clear that any modification of a criminal sentence includes the possibility of increasing the sentence as well as decreasing the sentence, or otherwise modifying the same. It is argued by Petitioner that the constitutional prohibition against double jeopardy, although applicable to the states, does not forbid a modification of a sentence such as the present case.

It has been shown that aside from prior Pennsylvania law, a study of other state and federal cases, makes it evident that while federal courts have, as a matter of procedure, refused to permit the increase of sentence, the majority of state and federal holdings establish that there is no constitutional prohibition to such an increase of sentence. Moreover, Petitioner contends that as offered above, the law of numerous jurisdictions permitting appellate review of sentence, and the almost unanimous approval of such review by commentators, and finally, the trend of the right to increase certain sentences in recent federal legisla-

tion, all support the constitutionality of the present Pennsylvania practice, contrary to the view of the Pennsylvania Supreme Court.

For these reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

ROBERT W. DUGGAN
District Attorney.

CAROL MARY LOS,
Assistant District Attorney.

ROBERT L. CAMPBELL,
Assistant District Attorney.

J. KENT CULLEY,
Assistant District Attorney.

Attorneys for Petitioner

APPENDIX A

IN THE
COURT OF COMMON PLEAS OF ALLEGHENY
COUNTY, PENNSYLVANIA—CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

vs.

MICHAEL LOUIS SILVERMAN,

Appellant.

No. 18 October Sessions, 1968

MEMORANDUM OPINION

STRAUSS, *J.*

Appellant was indicted at Q. S. No. 18 October Sessions, 1968, for possession of narcotic drugs.

He entered a plea of not guilty and waived a jury trial. On February 19, 1969, appellant was found guilty, and thereafter sentenced. It is the manner of sentence that defendant complains of and is the only issue in this appeal.

Defendant's contention is that he was first sentenced to a maximum of two years on February 20, 1969 (T. T. 111-112), and that on the following day he was sentenced to two to five years.

Even though the trial transcript states that the sentence of February 20 was two to two years, this is incorrect and is believed to be an error in reporting. The Court knows that the minimum cannot be more than one-half of the maximum. The Court's recollection is that the proposed sentence was two to four.

The cases are quite clear that a Court may alter its sentence within the same term of Court. As stated in *Com. vs. Downer*, 161 Pa. Super. 339, 53 A. 2d 897, "a Court has no authority to alter a sentence either by increasing or reducing the punishment imposed, *after the expiration of the term at which the defendant was convicted*." (Emphasis added).

In the instant case, the sentence was altered within the term of Court, and is, therefore, permissible. See also *Com. vs. Sprenkle*, 213 Pa. Super. 192, 195, 245 A. 2d 727, which approves the statement above quoted from *Downer*.

Furthermore, as can be seen from the proposed sentence on the first day, February 20, the sentence was contingent on various factors and was not intended as a final disposition. First of all, the Court indicated it would suspend its sentence of February 20, if Lexington would accept defendant. This matter was to be checked into by the Probation Office. The Probation Office reported the next day that the Court could not implement the Court's proposed sentence to Lexington.

For this reason, the Court made its official sentence on February 21, 1969, as quoted at length on pages 5 through 9 of the Commonwealth's brief before the Superior Court of Pennsylvania.

Dated: June 10, 1970.

s/ SAMUEL STRAUSS,
Judge.

APPENDIX B

IN THE
COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA—CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

vs.

MICHAEL SILVERMAN,

Defendant.

Q. S. No. 18 October, 1968
(Post Conviction.)

ORDER OF COURT.

AND NOW, to-wit, this 8th day of October, 1969, after hearing on the Post Conviction Petition filed by defendant, Michael Silverman, and after oral arguments of counsel, it is hereby determined that there is no merit in defendant's allegations, and the post conviction relief requested is hereby denied.

However, the post conviction relief hearing did reveal the fact that the defendant requested his private counsel to take an appeal on his case, which request was not complied with. For this reason, we are hereby granting an appeal *nunc pro tunc*, and defendant is given 30 days from the date of this order to file an appeal in his case.

BY THE COURT:

/s/ STRAUSS,
J.

APPENDIX C

THE SUPERIOR COURT OF PENNSYLVANIA
SITTING AT PITTSBURGH

Charles A. Hoenstine
Prothonotary

Helen D. Steele
Deputy Prothonotary

December 30, 1969

Michael Louis Silverman, C 9240.
Drawer R
Huntingdon, Pa. 16652

Re: Commonwealth v. Silverman
No. 718 Miscellaneous Docket

Dear Sir:

This is to advise you that the Court has entered the following order on the petition for leave to file an appeal *nunc pro tunc:*

"December 30, 1969
Petition granted
Per Curiam."

Pursuant to this Court's order, I am enclosing herewith an appeal and affidavit and you should fill this in completely with the *caption and number and term exactly as it appears in the lower Court.*

You should also send to me by return mail a statement from the Warden as to the amount of money to your credit at the Institution.

Very truly yours,

HELEN D. STEELE,
Deputy Prothonotary.

CAH/ep

cc: Miss Carol Mary Los,
Assistant District Attorney.

APPENDIX D

No. 275

IN THE

SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

vs.

MICHAEL LOUIS SILVERMAN,

Appellant

No. 140, April Term, 1970.

APPEAL FROM THE JUDGMENT OF SENTENCE OF THE COURT OF COMMON PLEAS, CRIMINAL TRIAL DIVISION, OF ALLEGHENY COUNTY AT NO. 180, OCTOBER TERM, 1968 (Q. S.)

PER CURIAM FILED: June 11, 1970.

Judgment of sentence affirmed.

HOFFMAN, *J.* files a dissenting opinion in which CERCONE, *J.* joins.

IN THE

SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

v.

MICHAEL LOUIS SILVERMAN,

Appellant

No. 140, April Term, 1970.

Appeal from the Order of the Court of Common Pleas, Criminal Division, of Allegheny County, at No. 18 October Term, 1968.

DISSENTING OPINION BY HOFFMAN, J.:

Filed: June 11, 1970

Appellant was convicted by a jury of possession of heroin. After the jury had returned its verdict, the trial court questioned appellant's counsel. "The Court: All right. How about sentencing tomorrow afternoon? "[Appellant's counsel]: That is fine, your Honor. "The Court: All right. We will dispose of it at 1:30 tomorrow afternoon."

The next afternoon an extended discussion took place, all of which is of record, concerning the appropriate disposition in appellant's case. At the conclusion of this discussion, the trial court addressed appellant. "The Court: In your case, the sentence of the Court is that you pay the costs of prosecution, that is on [the bill charging

you with possession of heroin], pay the costs of prosecution and undergo imprisonment in the Western Correctional Diagnostic and Classification Center for not less than two nor more than two [*sic*] years. This sentence is to be suspended upon condition that the federal authorities will commit you to Lexington under the program for the rehabilitation of narcotic users, which means that you must be there under an involuntary commitment for a period of seven months and then be paroled for a period of three years; the violation [of] which will return you automatically. Do you understand that? "[Appellant]: Yes, your Honor. "The Court: You can take up your negotiations as soon as the federal authorities notify us they are ready to accept you on those terms, and then our sentence is suspended."

The next day, however, the following appears of record. "The Court: All right. [Appellant], I tentatively, yesterday indicated what I thought we would do as a disposition in this case; and then as you left the room, I gave some second thoughts to the matter and I wanted to determine what the situation was in your case. I was a bit leery of your professed intention to want to go to Lexington and help yourself, then I learned that you had a number of other charges against you that are current, and this morning I find that there had been a pre-sentence report made by the Behavior Clinic of this county back in 1966. With all this additional information, I am convinced that the sentence I intended to impose altruistically in the hopes that maybe you could be cured from the narcotic habit was not based on fact, but rather on fiction; so I called you back at this time so that we may dispose of the sentence." A second extended discussion took place, following which the trial court again imposed sentence. "The sentence of the Court is that you . . . pay a fine of 6¼ cents or [the

bill charging you with possession of heroin] . . ., the costs of prosecution, and undergo imprisonment, that you be sent to the Western Correctional Diagnostic and Classification Center to serve not less than two nor more than five years for that charge, and that you stand committed."[1]

The bill of indictment indicates that appellant was sentenced to two to five years on the day of the second sentencing proceeding.

The foregoing, thus, presents several questions for our attention: (1) did the trial judge impose sentence the first day; (2) if so, what was that sentence; (3) if the judge did impose sentence the first day, what was the effect of the pronouncement the second day?

I

Did the trial judge impose sentence the first day?

As the record indicates, the trial judge twice seemed to impose sentence. On the first sentencing day, he sentenced appellant to undergo imprisonment, the term to be suspended if appellant could gain admission to the treatment program at Lexington. On the second sentencing day, he indicated that the first sentence had been tentative, although the record, so far as I can judge on review, lends no support to that view. The trial judge then imposed sentence again, this time imposing a prison term *without* conditionally suspending it.

On review, I believe we are bound by what the plain words of the record indicate. It seems that the trial judge sentenced appellant twice, the second sentence being im-

[1] Appellant had already been confined. He was subsequently given credit for ninety days he had spent so confined; including the day following the first sentence.

posed only because the judge had "second thoughts" about the first sentence.

II

What was the sentence imposed the first day?

The notes of testimony indicate that the first sentence was a conditionally suspended two to two year sentence. Several factors indicate, however, that the two year maximum indicated in the notes was a typographical error. First, the sentence for the charge for which appellant was convicted is a mandatory two to five year sentence. The Drug, Device and Cosmetic Act, Act of September 26, 1961, P. L. 1664, § 20, as amended, 35 P. S. § 780-20. Second, even were the trial judge permitted to give a fixed sentence, imposing a two to two year sentence would not have been the likely method by which the judge would have done so. See Act of June 19, 1911, P. L. 1055, § 6, as amended, 19 P. S. § 1057. Finally, there is no indication on appellant's bill of indictment that gives any support to a two to two year sentence.

Were there a reasonable doubt as to what sentence the judge imposed, we would be guided by *Commonwealth v. Hosendorf*, 437 Pa. 219, 263 A. 2d 439 (1970). We would be compelled to resolve any doubts we might have against the imposition of harsher punishment. *Id.* at 223, 263 A. 2d at 441. However, it would be unreasonable to believe that a judge would give an unlawful sentence in such an inept manner. I would conclude, therefore, that appellant's first sentence, so far as we are concerned, was a conditionally suspended two to five year term of imprisonment.

III

What was the effect of the pronouncement the second day?

Having resolved these preliminary questions, we must then consider whether the trial judge erred in revoking the conditionally suspended sentence.

It has generally been held that a court may modify its sentence within term of court. See, *e. g.*, *Commonwealth v. Mayloy*, 57 Pa. (7 P. F. Smith) 291 (1868).[2] This has been held to include the power to increase a sentence already imposed. See *Commonwealth ex rel. Gaynor v. Maroney*, 199 Pa. Superior Ct. 81, 83, 184 A. 2d 409, 410 (1962); *Commonwealth ex rel. Young v. Day*, 180 Pa. Superior Ct. 276, 279, 119 A. 2d 559, 560 (1956); *Commonwealth ex rel. Berry v. Tees*, 177 Pa. Superior Ct. 126, 129-130, 110 A. 2d 794, 795-796 (1955).

At least twice this Court has specifically held in abeyance deciding whether the power to increase a sentence within the term of court violates the guarantee against double jeopardy. In *Commonwealth ex rel. Berry v. Tees*, *supra*, Judge (now President Judge) WRIGHT indicated that the federal rule was contrary to that in Pennsylvania. Speaking for the Court, he said that the federal rule, notwithstanding its grounding upon the guarantee against double jeopardy, did not apply to the states but was only a restriction on the power of the federal government. *Id.* at 128-129, 110 A. 2d at 795. In *Commonwealth v. Vivian*,

[2] "[T]he power exercised is not to be found based on any express authority constitutional or statutory; nor in any express right of the convicts to its exercise [in decreasing a sentence] . . . . It is an auxiliary [power] but no more." *Id.* at 296. If the term of court terminates within thirty days, the court may now modify a sentence within thirty days of its order. Act of June 1, 1959, P. L. 342, No. 78, § 1, 12 P. S. § 1032 (Supp. 1970).

208 Pa. Superior Ct. 330, 222 A. 2d 739 (1966). Judge Jacobs, writing for the Court, specifically noted that since the guarantee against double jeopardy had not yet been applied to the states, the Court would not reconsider its holding until the Supreme Court had so applied it. *Id.* at 343 n. 4, 222 A. 2d at 746 n. 4.[3]

We can no longer avoid the implications of the guarantee against double jeopardy, since it is now binding upon Pennsylvania. *Benton v. Maryland*, 395 U. S. 784, 89 S. Ct. 2056 (1969). Those implications were clearly set forth in the Supreme Court opinion in *United States v. Benz*, 282 U. S. 304, 51 S. Ct. 113 (1931).[4] "The general rule is that judgments, decrees and orders are within the control of the court during the term at which they are made. They are then deemed to be 'in the breast of the court' making them, and subject to be amended, modified, or vacated by that court . . . . The rule is not confined to civil cases, but applies in criminal cases as well, provided the punishment be not augmented . . . . As a general practice, the sentence, when imposed by a court of record, is within the power of the court during the session in which it is entered, and may be amended at any time during such session, provided a punishment already partly suffered be not increased." The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based upon the ground that the court has lost control of the judgment in

[3] On review, the Supreme Court, through Mr. Justice Eagen, also noted that the guarantee had not, as yet, been applied to the states. *Commonwealth v. Virian*, 426 Pa. 192, 209 n. 5, 231 A. 2d 301, 305 n. 5 (1967).

[4] Mr. Justice Roberts, in a concurring opinion in *Commonwealth v. Virian*, note 3 *supra* at 202, 231 A. 2d at 306, indicated that he would apply the holding of *Benz* in cases where there is greater punishment in a second sentence.

the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution, which provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." *Id.* at 306-307, 51 S. Ct. at 114. See *Borum v. United States*, 409 F. 2d 433, 440-441 (D. C. Cir. 1967), cert. denied, 395 U. S. 916, 89 S. Ct. 1765 (1969); *Tatum v. United States*, 310 F. 2d 854, 855 (D. C. Cir. 1962); *United States v. Rosenstreich*, 204 F. 2d 321, 321-322 (2d Cir. 1953) (FRANK, J.); *cf. Oxman v. United States*, 148 F. 2d 750, 752-753 (8 Cir.), cert. denied, 325 U. S. 887, 65 S. Ct. 1569 (1945); *Acme Poultry Corp. v. United States*, 146 F. 2d 738, 739 (4 Cir. 1944), cert. denied, 324 U. S. 860, 65 S. Ct. 865 (1945).

The rationale for such a rule has been best stated in the following passage from *Ex parte Lange*, 85 U. S. (18 Wall.) 163, 173 (1874): "For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger of jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction, a second punishment inflicted?" See *In re Bradley*, 318 U. S.

50, 63 S. Ct. 470 (1943). See also Sentencing Alternatives and Procedures, A. B. A. Project of Minimum Standards for Criminal Justice § 6.1(b). Notwithstanding its secondary status in *Laine*, of great importance, too, is the subjection of the defendant twice to the anxiety and trauma of the sentencing process. Both the possibility of double punishment and the anxiety of double sentencing violate the guarantee.

Reasons other than constitutional make it important that a trial judge not be permitted to increase a sentence whose service has already begun. As I said with respect to the rule that prohibits like increases following the term of court, "[w]e want the trial judge to take great care in sentencing. He should give adequate consideration to the many factors which should influence his decision, among which are the rehabilitation of the defendant and deterrence to the general population. The knowledge that his decision will be undone only under exceptional circumstances will insure that care. Moreover, the rule prevents extraneous considerations from affecting the trial judge's sentencing. The decision as to sentence remains the trial judge's until made public. Once made public, the rule prevents easy attack thereupon; a goal which insures both a just decision to the defendant and the integrity and independence of the judiciary." *Commonwealth v. Allen*, __ Pa. Superior Ct. __, __ A. 2d __ (1970) (dissenting opinion).

For these reasons, I would rule that we can no longer maintain our traditional holding that a trial judge can increase a sentence within term of court, once the defendant has begun its service.[2]

[2] I would not decide whether a defendant on bail following sentence and pending appeal or on probation has begun "service" so as to come within this ruling.

In the instant case, there is no doubt that appellant's sentence was increased. His first sentence was suspended conditioned upon his acceptance into the treatment program in Lexington, Kentucky. Following that program, he was to be paroled for three years. Instead of that sentence, he was to be incarcerated for two to five years. Although he was not as yet accepted into the program, there was the possibility that he would have been.[6] If so, he would have been treated and then released. It is evident that such a program would have been less restrictive of liberty than incarceration.

I would reverse the order of the lower court and reinstate appellant's first sentence.

CERCONE, J., joins in this dissenting opinion.

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[6] Hence, this case is not at all parallel to *Commonwealth v. Brown*, note 3 *supra*, where the condition of the conditional sentence was not fulfilled.

APPENDIX E

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Patrick N. Bolsinger
Prothonotary

Helen D. Steele
Deputy Prothonotary

August 17, 1970

Michael Louis Silverman, C-9240
Drawer R
Huntingdon, Pa. 16652

Re: Commonwealth v. Michael Louis Silverman
No. 3297A Miscellaneous Docket

Dear Sir:

This is to advise you that the Court has entered the following Order on your petition for allowance of appeal from the Order of the Superior Court at No. 140 April Term, 1970, in the above-captioned matter:

"August 13, 1970

Petition granted and appeal is permitted to be filed within 30 days.

M. J. EAGEN, J."

Accordingly, I enclose herewith an appeal and affidavit for your use in taking this appeal to the Supreme Court. Will you please execute the same and return it to this office promptly so that your case may receive a number in the Supreme Court. The case will be listed for the session commencing in Pittsburgh on September 28, 1970. The fee

for filing the appeal is $9.00 inasmuch as you already paid the $3.00 when you filed the allocatur.

Very truly yours,

HELEN D. STEELE,
Deputy Prothonotary.

PNB:ad
Enclosure
cc: Miss Carol Mary Los
Aug 18 1970.

APPENDIX F

IN THE

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v

MICHAEL LOUIS SILVERMAN,
Appellant

No. 8, March Term 1971

Appeal from the Order of the Superior Court of Pennsylvania to No. 140 April Term 1970, affirming the Judgment of Sentence of the Court of Common Pleas, Trial Division, Criminal Section, of Allegheny County to No. 18 October Term 1968. Entered: August 27, 1970.

OPINION.

FILED: MARCH 18, 1971

EAGEN, J.

On February 19, 1969, Michael Louis Silverman was convicted in a nonjury trial in Allegheny County of possessing heroin in violation of the Drug, Device and Cosmetic Act of September 26, 1961, P. L. 1664 § 20, as amended, 35 P. S. § 780-20.

On February 20, 1969, Silverman was called before the trial judge for sentence, and, as disclosed by the record, a lengthy colloquy ensued concerning the defendant's previous background and a proper disposition of the case. The judge then addressed Silverman and said: "The Court: In your case, the sentence of the Court is that you pay the cost of prosecution, that is on [the bill charging you with possession of heroin], pay the cost of prosecution and undergo imprisonment in the Western Correctional Diagnostic and Classification Center for not less than two or more two [*sic*] years[1]. This sentence is to be suspended upon condition that the federal authorities will commit you to Lexington under the program for the rehabilitation of narcotic users, which means that you must be there under an involuntary commitment for a period of seven months and then be paroled for a period of three years; the violation [of] which will return you automatically. Do you understand that? [Appellant]: Yes, your Honor. The Court: You can take up your negotiations as soon as the federal authorities notify us they are ready to accept you on those terms, and then our sentence is suspended."

[1] While the transcribed notes of the proceeding filed of record state "not less than two or more two years" this is probably a typographical error. The Act of 1961, specifically provides for a mandatory sentence of from two to five years.

On February 21st, Silverman was called before the trial judge again, and the judge said he had some "second thoughts" about his action of the previous day, and, *in the meantime, had received a copy of a report made by the county's Behavior Clinic in 1966, and also had been informed of other criminal charges currently pending against Stored.* Whereupon, a new sentence was imposed directing that Silverman serve a term of imprisonment in the Western Diagnostic and Classification Center of not less than two nor more than five years, upon which it was directed that he stand committed. Silverman filed an appeal to the Superior Court which, subsequently, affirmed the judgment of sentence without opinion. Judge Hoffman filed a dissenting opinion in which Judge Cercone joined. See 217 Pa. Superior Ct. 68, 266 A. 2d 794 (1970). We granted allocatur and now reverse.

The narrow, but important, question presented is whether Silverman was subjected to double jeopardy in violation of the double jeopardy clause in the Fifth Amendment to the United States Constitution.

For many years the courts in Pennsylvania ruled that the prescription in the United States Constitution against double jeopardy was not binding on the states, and that the double jeopardy provision in the Pennsylvania Constitution [Art. I § 10] applied only to capital offenses. See *Commonwealth v. Warfield*, 424 Pa. 555, 227 A. 2d 177 (1967) and cases cited.

Premised upon the foregoing conclusions, it was ruled that Pennsylvania trial courts had the power to modify or increase a sentence imposed on a criminal defendant if such change were effected during the same term of court in which the original sentence was imposed. See *Commun-*

wealth v. Gallagher, 200 Pa. Superior Ct. 136, 186 A. 2d 842 (1962).[2]

In 1959 the Pennsylvania Legislature passed a statute, the Act of June 1, 1959, P. L. 342,[3] modifying the previously established "term of court" rule so as to extend the power of a trial court to reconsider and change a sentence for a period of thirty days, if the term of court terminated prior to the thirty-day period.[4]

However, the Supreme Court of the United States in *Benton v. Maryland*, 395 U. S. 784, 89 S. Ct. 2056 (1969) ruled that the double jeopardy prohibition in the United States Constitution is binding on the states, and, hence, our prior decisions to the contrary must now be disregarded.

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[2] However, an exception to this rule was recognized, *i.e.*, if the sentence imposed were fully executed, then the power of the court to increase and subject the defendant to additional punishment was extinguished. See *Commonwealth v. Penna. R. R. Co.*, 11 Pa. Superior Ct. 29 (1899).

[3] The Act of June 1, 1959, P. L. 342, § 1, 12 P. S. § 1032 (Supp. 1970) pertinently provides:

> "In any civil, criminal or equitable proceeding in which the court has heretofore been vested with the power, jurisdiction and authority to alter, modify, suspend, reinstate, terminate, amend or rescind, any order, decree, judgment or sentence only during the term of court in which the order, decree, judgment or sentence, was entered of record, the court in addition to such power, jurisdiction and authority shall hereinafter have the same power, jurisdiction and authority to alter, modify, suspend, reinstate, terminate, amend or rescind the order, decree, judgment or sentence for a period of thirty days subsequent to the date of entering of record the order, decree, judgment or sentence in any instance where the term of court shall terminate prior to such thirty day period: Provided, That all parties in interest including the district attorney in criminal cases, are notified in advance of such proposed alteration, modification, suspension, reinstatement, termination, amendment or rescission."

[4] For the purposes of this opinion, we need not decide whether or not the Act of 1959, *supra*, may be construed so as to empower a trial court to increase a sentence imposed on a criminal defendant

The question follows: Does the modification of a sentence imposed on a criminal defendant which increases the punishment constitute further or double jeopardy? Our research indicates that the United States Supreme Court has not as yet said so specifically, but we are persuaded that this is so only because the precise question has yet to be ruled upon.

In *Ex parte Lange*, 18 Wall. 163, 173, 21 L. Ed. 872 (1873), the court pertinently stated:

> "For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. *But, if after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value?* Is not its intent and its spirit in such a case as much violated as if a new trial had been had and, on a second conviction, a second punishment inflicted?
>
> "The argument seems to us irrestible and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." (Emphasis throughout ours.)

Also in *United States v. Benz*, 282 U. S. 304, 306, 51 S. Ct. 113, 114 (1931), where the Court faced the question of whether a federal court had the power "to amend, during the term of court in which it was imposed, a sentence in a criminal case by shortening the period of imprisonment after part of it has been served", the Court asserted:

> "The general rule is that judgments, decrees and orders are within the control of the court during the term at which they were made. They are deemed to be in the breast of the court making them, and subject to be amended, modified, or vacated by that court [citation omitted]. The rule is not confined to civil cases, but applies in criminal cases as well, *provided the punishment be not augmented*. *In Re* [*Ex parte*] Lange, 18 Wall. 163, 167-174, 21 L. Ed. 872; Basset v. United States, 9 Wall. 38, 19 L. Ed. 548. In the present case the power of the court was exercised to mitigate the punishment and is thus brought within the limitation. Wharton in Criminal Pl. and Pr. (9th ed.) § 913, says: 'As a general practice, the sentence, when imposed by a court of record is within the power of the court during the session in which it is entered, and may be amended at any time during such session, provided a punishment already partly suffered be not increased.'
>
> "The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, *but not so as to increase it*, is not based upon the ground that the court has lost control of the judgment in the latter case, *but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense* in violation of the Fifth Amendment to the Constitution, which provides that no person shall be subject for the same offense to be

twice put in jeopardy of life or limb.' This is the basis of the decision in *Ex parte* Lange, *supra*." [Emphasis throughout ours.]

The above quoted language in *Benz*, may properly be classified as dictum, since the facts then before the court involved only the power of a court to *decrease* a sentence. The before quoted language in *Ex parte Lange* is in the same category, since the factual situation presented to the court therein was a modification of the original sentence after that sentence had been *fully* executed. Nonetheless, it is the strongest kind of dictum, and so clear and unequivocal, that there is no doubt in our minds that if the issue is ever reached, the United States Supreme Court will rule that a modification of a sentence imposed on a criminal defendant which increases the punishment is double jeopardy, and we now so rule. On a criminal defendant provided such were effectuated within thirty days, this, in our view, would be inconsistent with the federal constitutional prohibition against double jeopardy.[5]

The case of *North Carolina v. Pearce*, 395 U. S. 711, 89 S. Ct. 2072 (1969) does not compel a different conclusion. *Pearce* dealt with the problem of reconviction and resentencing where on appeal by the defendant, the original sentence had been set aside. As the Court therein stated: "We deal here, not with increases in existing sentences, but with the imposition of wholly new sentences after wholly new trials." At 395 U. S. 722, 89 S. Ct. 2079. In such a case

[5] The Fifth Amendment's double jeopardy clause represents a constitutional policy of finality and protects the defendant from continuing distress. See *United States v. Jorn*, —— U. S. ——, 91 S. Ct. 547 (1971), and *Green v. United States*, 355 U. S. 184, 78 S. Ct. 221 (1957). See also, 75 Yale L. J. 262 (1965). It bars placing a defendant in "jeopardy" a second time even though the first prosecution was aborted by an abuse of discretion on the part of the trial court. See *United States v. Jorn*, *supra*.

the defendant by appealing the original sentence voluntarily assumes the risk of a new trial and all the attending repercussions. See *United States v. Tateo*, 377 U. S. 463, 84 S. Ct. 1587 (1964), and *United States v. Ball*, 163 U. S. 662, 16 S. Ct. 1192 (1895).

Herein, on February 21st, the day the second sentence was imposed, the trial judge indicated that the sentence imposed on February 20th was a "tentative" one. While it is true that the suspension of the February 20th sentence was conditioned upon Silverman's acceptance to the Lexington rehabilitation hospital,[6] the sentence, as recorded, indicates the imposition of no other conditions, or that it was "tentative" in any sense, except for the condition before noted, and we are bound by the record.[7]

Finally, we are unpersuaded that *Commonwealth v. Hosendorf*, 437 Pa. 219, 262 A. 2d 439 (1970) is apposite here.[8] Unlike the situation in *Hosendorf*, the record of the proceedings on February 20th in the instant case leaves no doubt as to the sentence then imposed.

The order of the Superior Court is reversed; the judgment of sentence imposed in the trial court on February 21, 1970, is vacated; and, the judgment of sentence imposed on February 20, 1970, is reinstated.

Mr. Chief Justice Bell dissents.

Mr. Justice Cohen did not participate in the decision of this case.

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[6] There was no opportunity given to effectuate this condition before the second sentence was imposed.

[7] Under the facts before us, it is unnecessary to reach and decide the question of whether it is constitutionally permissible for a court to increase a truly expressed tentative sentence when the conditions stipulated do not materialize. But see, *Commonwealth v. Vivian*, 426 Pa. 192, 231 A. 2d 301 (1967).

[8] The recorded opinion in *Hosendorf, supra*, did not express the views of a majority of the Court, and, therefore, is not decisional.